No. 12,986

IN THE

ted States Court of Appeals

For the Ninth Circuit

ING FOO,
Appellant,

ARD MCGRATH, Attorney Gen-
f the United States,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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---

onorable William Denman, Chief Judge, and e Honorable Associate Judges of the United s Court of Appeals for the Ninth Circuit:

OPENING STATEMENT.

ause poses a legal problem of considerable ce to the United States and to the effective ation of its immigration laws. The problem the scope and purport of Section 503 of the ty Act of 1940 (8 U.S.C. 903) in its applica- person seeking admission into the United r the first time, under claim of derivative

ceedings taken before the Immigration autho
prescribed by statute (8 U.S.C. 153). The
decision herein may well have serious impac
practical efficacy of the enforcement of th
migration laws intended to safeguard aga
entry of aliens into the United States witho
Appellee is convinced that a more complete
tion of the case upon rehearing will satisfy t
orable Court that the ruling of the Distric
allowing into evidence the official records of
ceedings before the Board of Special Inqui
investigation of appellant's citizenship claim,
error. For the foregoing reasons, herein
tailed, appellee respectfully requests a
herein.

I.

**"TRIAL DE NOVO" IS NOT A TERM HAVING ONE IN
MEANING. WHERE, AS HERE, IT RELATES TO
CIAL RE-TRIAL OF AN ISSUE ALREADY HEA
ADMINISTRATIVE PROCEEDING INVOLVING T
PARTIES, BEFORE A TRIBUNAL AUTHORIZED B
DETERMINE THAT ISSUE, THE TERM IMPLIES
EXAMINATION AND RE-EVALUATION OF THE
ADDUCED AT THE PRIOR PROCEEDING, TOGETH
A CONSIDERATION OF WHATEVER NEW AND AD
EVIDENCE IS OFFERED AT THE DE NOVO HEA**

Appellee finds no reported case arising un
tion 503 of the Nationality Act holding, i
brought thereunder by a foreign-born plainti
claim of citizenship and right of entry into th

d consider the contents of the record of the
ıgs of that board, duly taken under the pro-
f 8 U.S.C. Sec. 153. On the other hand,
eow Tung v. Clark, 83 F. Supp. 482, we find
court, trying *de novo* the issue of plaintiff's
derivative citizenship in a suit filed under
ɔnality Act, admitted into evidence various
ts of proceedings had before the department
nd agencies to determine that issue; and,
here was such a conflict between the evidence
in those proceedings and testimony given at
the court decided that plaintiff had failed
ı his burden of proof that he was a citizen.
Ying Og v. Clark, 81 Fed. Supp. 696 the
tes with reference to Section 503 of the Na-
Act:

is clear that the statute contemplates a trial
ɔvo of the issue of citizenship and not merely
iew of the administrative action." (p. 697.)

nguage above quoted does not indicate a be-
the court hearing the trial *de novo* is pre-
om any consideration of the administrative
ken on the citizenship issue.

Grath v. Chung Young, 188 F. (2d) 975 (9th
), it appears from the opinion of this court
determination of nationality by the trial
that action was based on the finding of the
f Special Inquiry, together with additional
y offered at the trial.

Compensation Act of Montana. In *Worn*
conda Copper Mine Co., 43 P. (2d) 663,
Supreme Court of that state held that th
meant that

> "all the evidence taken by the board, ar
> additional evidence taken in the Cour
> be considered together and that, upon
> dence as a whole, the Court should rende
> ment."

The foregoing interpretation of the term
novo" has been judicially accepted as corre
eral other instances, to which we now refer t

(a) An appeal in admiralty entitles the
to a trial *de novo;* yet the record of the cou
is part of the evidence considered at the
appellate hearing.

> *The Cricket,* 71 Fed. (2d) 61 (C.A. 9
> 2 *C. J.* p. 318, Sec. 187a.

(b) In the article *"Appeal and Error",*
Juris, p. 726, Sec. 2647, it is stated:

> "Under the old chancery practice an
> under the Code of Civil Procedure,
> equity are tried de novo on appeal
> entire record and evidence."

(c) Congress, by Act of 1888 (25 St
granted to any Chinese person convicted
United States Commissioner of being u
within the United States in violation of the
Exclusion Laws, the right to appeal his c

imately reached the United States Supreme
llowing the taking of such an appeal. In
, it appeared from the Supreme Court opin-
he record of the proceedings before the Com-
was received in evidence by the District
part of the proof upon which the case was
novo; and this practice was, at least tacitly,
by the Supreme Court. (*Liu Hop Fong v.
States,* 209 U.S. 453; *Ah How v. United
93 U.S. 65; *Tom Hong v. United States*, 193
)

the leading case of *Ng Fung Ho v. White,*
276, in commenting on the *judicial* nature
tation proceedings under the Chinese Exclu-
, the Supreme Court stated, at page 283:
is commenced usually before a Commissioner
ne Court; *but on an appeal to the District
t additional evidence may be introduced and
rial is de novo.*" (Italics supplied.)

This court held in *Carmichael v. Delaney,* 170
239, (9th Cir. 1948) that a *resident* of the
States claiming citizenship, whose return to
try from abroad is prevented by an executive
order determining him to be an alien, may,
ceeding in habeas corpus, obtain a *judicial*
he issue of his claim to citizenship. Yet, it
rved by this court that at such *judicial* trial,
on to other evidence received:
e record made before the Board of Special

(e) The court may take judicial notice
numerous instances in which Federal statutes
ting of a judicial trial *de novo* of issues pr
determined administratively, also expressly
for the admission of the administrative recor
dence to be considered at the *de novo* trial.

The manner in which State Superior Cou
are conducted in California upon appeals fr
ments rendered in Justice's Courts on ques
fact, offers no criterion for the manner in wh
contemplated by federal law that a trial *de*
had under Section 503 of the Nationality Ac
issue of the citizenship of a foreign-born non
after the same had been previously heard an
mined in executive exclusion proceedings.
thing, trial proceedings in California Justice'
are not officially reported and there is, conse
no record available for appellate consideratio
thermore, California Code of Civil Procedure
980a is so phrased as to require, in the opinio
California Courts, the legal conclusion that
ceedings in the court below, on questions of
intended by statute not to be considered on
Neither can any analogy favorable to appella
tention be drawn from the manner in whic
trial is conducted when held before the same
tribunal. In the latter case, the new trial resu
some error which requires a complete vacatio
former proceedings.

novo" in the instant case, or the reasons orities herein given which fully support that

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II.

ARENT THAT CONGRESS NEVER INTENDED BY SEC-503 OF THE NATIONALITY ACT, TO PROVIDE FOR UDICIAL TRIAL DE NOVO OF A CLAIM TO CITIZEN-ASSERTED THEREUNDER, WITHOUT REGARD FOR PROVED AT PRIOR EXECUTIVE PROCEEDINGS ULLY HELD TO DETERMINE THAT VERY ISSUE.

years prior to the enactment of the National-of 1940, Congress provided by statute for a ensive procedure whereby foreign born per-ing entry into the United States under claim ative citizenship, might have their claims nd determined by executive officials of the ent. (Immigration Act of 1917, 8 U.S.C. 153.) en long established by Supreme Court author-when a person, who has never resided in the tates,

sented himself at its border for admission, mere fact that he claimed to be a citizen did entitle him under the Constitution to a cial hearing; and that unless it appeared that Departmental officers to whom Congress had usted the decision of his claim, had denied an opportunity to establish his citizenship, fair hearing, or acted in some unlawful or roper way or abused their discretion, *their*

Quon Quon Poy v. Johnson, 273 U.S. 352,
citing *United States v. Sing Tuck,* 194 U.S.
United States v. Ju Toy, 198 U.S. 253, 263; *C*
v. United States, 208 U.S. 8, 11; *Tang Tun*
223 U.S. 673, 675; *Ng Fung Ho v. White,*
276, 282.

This court has recently commented upon
dom of legislation committing to the final de
tion of executive officers of government, the
non-residents to derivative citizenship, and o
ing such determination to judicial review wit
only to the fairness of the administrative he
corded. In *Carmichael v. Delaney,* supra, t
recognized the potential practical difficulties
in the enforcement of the Chinese Exclusi
describing them as (p. 243, footnote 4) "d
which would be intensified if the member
undesired race were held entitled to a tr
formal than an executive hearing."

In the face of the long established nation
and procedure governing the enforcement of
the exclusion of aliens seeking to enter th
States unlawfully, and the reasons underly
policy and procedure, it would be entirely inc
therewith now to ascribe to Section 503 of
tionality Act of 1940, a meaning which m
effectuate a complete negation of such policy
cedure, although the reasons therefor remai
constant. Appellee submits, therefore, that

lass to which appellant belongs, wherein, fol-
full and fair administrative hearing and final
nation on the issue of his citizenship, he may
tigate that issue without respect for the facts
and findings reached at the administrative
f we are to maintain the integrity of those
rative proceedings, which are condition
t to any trial *de novo* under Section 503 of
ionality Act,—for there can be no right of
ereunder, until there has been an administra-
ial of citizenship,—the term *"trial de novo"*
accorded the meaning which has been given
e numerous instances hereinbefore specified.
se, untenable consequences can be expected to
f which the instant case is an example. That
: a foreign born person claiming a right of
virtue of derivative citizenship, whose claim
red by law to be heard and determined by
migration authorities, may, if his claim be
btain a judicial trial *de novo* of the issue of
enship, by filing a suit under Section 503 of
ionality Act. Then at the trial *de novo* he
essfully exclude from the court's examination
t of the record of the prior proceedings which
tain evidence damaging to his claim, albeit
on his own behalf. Thus he becomes em-
to use the administrative processes of this
ent as a preliminary trial run of his claim,
e can assure himself of a more advantageous
the judicial trial *de novo* of his citizenship

It is little answer here that the witnes
Gong, was in San Francisco at the time of t
physical presence there did not assure the a
the government to produce him, or validat
lants' objection to the trial court's consider
testimony he himself introduced at the prio
istrative proceedings.

The weight and credibility to attach to t
mony lies within the exclusive control of
judge, whose experience will qualify him to
in proper context in relation to whatever
additional evidence is offered *de novo*. Sit
court of equity, he should not be restricte
consideration of this testimony, by the more
rules of evidence which obtain in common lav

III.

APPELLANT'S AUTHORITIES DO NOT SUPPORT HIS THAT UPON A JUDICIAL TRIAL DE NOVO OF DETERMINED IN A PRIOR PROCEEDING BETW SAME PARTIES, THE CERTIFIED RECORD OF TH PROCEEDING IS INADMISSIBLE AS EVIDENCE T SIDERED BY THE COURT AT THE DE NOVO HEA

None of the cases cited in appellant's open
uphold the principle that a court trying *de*
issue previously determined in an administra
ceeding involving the same parties, is forbi
benefit of proof elicited at the prior proce
part of the evidence upon which its judicial

vo quotations cited on page 5 of appellant's brief, are from cases which merely rule that administrative hearings which do not have objective the determination of issues between have no probative value in a subsequent judi- thereof. An exclusion proceeding before the f Special Inquiry, acting under statutory tion of Title 8, U.S.C., Section 153, is for ess purpose of finally determining citizenship persons presumptively alien.

ellant's reply brief, p. 3-4, he cites the case *urg S.S. Co. v. Brown,* 171 Fed. (2d) 175 bsent proper analysis and distinction, might o lend support to his position with respect ture of the trial *de novo* to which he was here Actually, the contrary is so. *Pittsburg S.S. Brown* was a case factually similar to that l to the Supreme Court in *Crowell v. Benson,* 22. Both cases involved the same legal issue, lated to the admissibility in evidence of the f an administrative proceeding, at a judicial *novo* of certain of the matters determined in administrative proceeding. The decision in *g S.S. Co. v. Brown* followed that of *Crowell n.* We therefore turn to the latter case to ate that appellant's authority, rather than ng his position, actually substantiates that lee with respect to the meaning of trial *de* a suit under Section 503 of the Nationality

Act. *Crowell v. Benson,* like *Pittsburg S.S. Brown,* involved a suit to enjoin the enforce a compensation award made under the Lo men's and Harbor Workers' Compensation A Supreme Court there held that the trial cou ing *de novo* issues of fact upon which depe jurisdiction of the Compensation Commission the award, was justified in refusing to re evidence the transcript of the testimony be Deputy Commissioner relating to that p issue. But each reason advanced for the reached in *Crowell v. Benson* accentuates the ness of appellee's contention here as to the tr ing of "trial *de novo*" in a suit under Sectio the Nationality Act. We therefore submit th ing analysis of *Crowell v. Benson.*

First, *Crowell v. Benson* held that the deter by the Compensation Commission of the fac sary to sustain its own jurisdiction, need been accorded evidentiary weight in the trial before the United States District Court, s trial *de novo* was for the very purpose of j ascertaining whether that jurisdiction actually But at page 57, the court makes this qualifica

> "In relation to the Federal governm have already noted the inappositeness to ent inquiry of decisions with respect to nations of fact *upon evidence and wi authority conferred, made by admin agencies which have been created to ai*

ormance of government functions and where mode of determination is within the control ongress." (Italics supplied.)

tizenship of a foreign born person, presumpien, who seeks admission into the United r the first time, is not a fact upon which the ion of the Immigration and Naturalization to exclude aliens has been made to depend. act which has been committed by law to the ermination of that executive agency.
nited States v. Ju Toy, 198 U.S. 253, 8 U.S.C. 153.

tion 503 of the Nationality Act has enlarged scope of the court's power to review such determination, it still remains the law that of citizenship in the case above mentioned, within the power of the Immigration and zation Service to determine.

lly: The rule of *Crowell v. Benson* is eximited in its application to cases arising be*ivate* litigants. On page 50, the court states: As to determinations of fact, the distinction once apparent between cases of private right those which arise between the government persons subject to its authority in connection the performance of the constitutional funcs of the executive or legislative departments *. Thus Congress, in exercising the powers ded to it, may establish 'legislative' courts * to serve as special tribunals 'to examine

and determine various matters arising
the government and others, which fr
nature do not require judicial determina
yet are susceptible of it'. But 'the mo
termining matters of this class is c
within congressional control. Congress
serve to itself the power to decide, may
that power to executive officers, or may
it to judicial tribunals.' ''

Thirdly: *Crowell v. Benson* did not hold
District Court was in that case *forbidden* fro
ing in evidence the record before the Deputy
sioner. It merely held that inasmuch as
being tried *de novo* related to the jurisdicti
Deputy Commissioner to hear and determine
ter before him, the court was "under no c
to give weight to his proceeding pending the
nation of that question." (p. 64.)

Finally: Justice Brandeis, dissenting from
jority opinion in *Crowell v. Benson,* expre
view that the trial court should have been
to receive in evidence and consider the reco
the Commission, stating, p. 85:

> "Nothing in the Constitution, or in a
> decision of this court to which attention
> called, lends support to the doctrine th
> dicial finding of any fact involved in
> proceeding to enforce a pecuniary liabi
> not be made upon evidence introduced
> properly constituted administrative trib

a determination so made may not be deemed independent judicial determination." (Italics plied.)

CONCLUSION.

ant makes no claim that he was not accorded ess at the exclusion proceeding before the Special Inquiry to determine his citizenship that the determination by that Board was on substantial evidence. He seeks, however, t an impotency to the entire exclusion pro- and the resulting determination unfavorable tizenship claim, by reading into the term *novo*", a meaning which could well succeed g upon this government the difficult burden oving a claimed father-son relationship al- have its origin on foreign soil. And thus , a presumptive alien, successfully relieve f the burden which at all times is legally his, ishing by a preponderance of the evidence, d States citizenship; a burden which should pon him full responsibility for explaining acies in testimony of his own offering at the ring.

ee respectfully submits that reason and law ast any definition of "trial *de novo*" in pro- under Section 503, which would deny to the t below the right to examine and weigh the eloped at proceedings before the Board of

Special Inquiry, on the issue of appellant's
ship.

Dated, San Francisco, California,
March 24, 1952.

Respectfully submitted,

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and Petitioner.

CERTIFICATE OF COUNSEL.

y certify that I am of counsel for appellee
ioner in the above entitled cause and that in
nent the foregoing petition for a rehearing
unded in point of law as well as in fact and
petition for a rehearing is not interposed

San Francisco, California,
March 24, 1952.

ANTOINETTE E. MORGAN,
Of Counsel for Appellee
and Petitioner.